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No. 06-1087

IN THE

Supreme Court of the United States

PETER LUKS,

Petitioner,

v.

BAXTER HEALTHCARE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BAXTER'S "STATEMENT" CONTAINS INACCURATE AND IRRELEVANT FACTS

Baxter states that '*[a]ccording to Luks* . . . John Goode had a 'plan' to get rid of the three oldest employees in the department, including Luks." Opp. Brief at p. 1. (emphasis added). However, the Seventh Circuit *conceded* that:

> We may assume for the sake of argument that these bits of evidence, individually and collectively, are consistent with there being a wish and a plan by Goode to get rid of Luks along with Helsith and Jurmann irrespective of their actual performance. The factfinder arguably could infer from the testimony of Overby, as Helsith's and Jurmann's immediate supervisor, that they were being targeted for termination for reasons unrelated to their performance. . . . The documents, which mention Luks as well as Helsith and Jurmann and which appear to have predated the implementation of any of the performance plans, likewise could be seen as being consistent with a preconceived plan to get rid of all three employees. App. 10a.

Baxter further states that Luks asserts that the performance evaluation and corrective action plan that lead to his termination were "inaccurate and unfair." Opp. Brief at p. 1. What Luks, in fact, contends, is that in light of Goode's "plan" and his directives to Kazl, the performance issues and the plan were fabricated to form a pretextual basis for his termination.

Finally, Baxter's reference to Goode's and Kazl's ages is misleading. First, Luks is significantly older than both Kazl and Goode. More importantly, any presumption that decision-makers over 40 years old would not discriminate against other members of the protected category has been unequivocally rebutted by Goode's acknowledged "plan" to terminate the oldest members of his department. *See, e.g., Wathen v. Allison Engine Company*, 102 F.Supp 2d 1015, 1025 (S.D. Ind. 2000).

REASONS FOR GRANTING THE PETITION

Luks agrees that the "Questions Presented" by him involve well settled issues of law. However, the Seventh Circuit wholly deviated from these well settled principals such that review by this Court is warranted, just as it was in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Significantly, Baxter makes only a passing reference to *Reeves*. Opp. Brief at p. 9. Baxter attempts to distinguish this case from *Reeves* based *solely* on the Seventh Circuit's erroneous conclusions that "Goode did not recommend, urge or otherwise initiate Luks' termination" and that "there is no evidence that Kazl was a party to [John Goode's] plan and concocted false criticisms of Luks' work in an effort to carry the plan out." Opp. Brief at p. 9. In reaching these conclusions, the Seventh Circuit was simply not weighing the evidence in the light most favorable to Luks.

The Seventh Circuit conceded that Goode targeted Luks, Helsith and Jurmann irrespective of their performance. Yet the Seventh Circuit and Baxter ignore evidence of *his directives to Overby to fabricate performance plans for Helsith and Jurmann, and Kazl's* ***admissions to Overby*** *that Goode gave her a similar directive and that she was not sure what "they" wanted.* It took Kazl *two months* to create the plan. Moreover, to the extent that the District Court and the Seventh Circuit relied on Kazl's own testimony to support

the conclusion that she acted "independently," let us not forget that Kazl is still employed by Baxter and Overby was actually terminated by Goode for expressing concerns about Goode's "directives" with regard to Helsith and Jurmann to Human Resources.

Even the Seventh Circuit acknowledges that Goode was involved in Kazl's decisions "at each step of [the] process" and that he "coached" her in the implementation of the performance plan. App. 12a, 13a.

Baxter simply cannot overcome the fact that the evidence clearly supports the inference that Goode was not only involved, but was the driving force, in the decisions leading to Luks' termination. If truly viewed in the light most favorable to Luks, this evidence is sufficient to create genuine issues of material fact as to whether Baxter's reason for terminating Luks is unworthy of credence. It is well settled that "[i]t is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves*, 530 U.S. at 146-147, citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993).[1]

Significantly, Baxter's Brief in Opposition fails to address the fact that Luks, Helsith and Jurmann had absolutely *nothing* in common *other than* their age and the fact that they worked under Goode. It also fails to address the fact that Goode was indeed successful in his plan to get Luks, Helsith and Jurmann out of his department.

If Luks' circumstantial evidence of discrimination is insufficient to support the inference of age discrimination, it

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[1] In this regard, Baxter's focus on Goode's age-related comments in Section I of its Brief is a diversionary tactic. Luks' circumstantial evidence of pretext and Goode's age-related animus was sufficient without these comments to survive summary judgment.

is difficult to conceive what evidence, short of an admission by the employer of age-related animus, would be sufficient for a victim of age discrimination to survive summary judgment. This Court has instructed that ""the 'plaintiff [has] his day in court despite the unavailability of direct evidence.' "*Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985), quoting *Loeb v. Textron*, 600 F.2d 1003, 1014 (1st Cir. 1979).

The Court must not sanction the Seventh Circuit's weighing of facts in favor of Baxter in direct contravention of Fed. R. Civ. P. 56. Nor should it sanction the court's abrogation of the circumstantial evidence standard. If this decision is permitted to stand, victims of age discrimination will truly have little or no recourse.

Luks and other victims of age discrimination are entitled to their day in court.

CONCLUSION

For each of the foregoing reasons, the Petition for a Writ of *Certiorari* should be granted, the decision of the Seventh Circuit reversed, and the case remanded to the district court for trial.

Respectfully submitted,

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